Blowin' against the Wind: the Future of EU trade Policy

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On 21 November, U.S. President-elect Trump unveiled some of his plans for the first hundred days in office. Among the announced measures, there is most notably the decision to halt the progress of the Trans Pacific Partnership (TPP) trade agreement. Indeed, throughout the recent presidential race, it appeared that all candidates assumed that advocating free trade would not go far with U.S. voters. At present, in the EU too the wind seems to be blowing in a similar direction. There appears to be a widespread and growing anti-free-trade sentiment in some parts of the population. Several slogans and arguments used in the campaign in favour of *Brexit* clearly witness this, and the recent experience of the EU with agreements such as the Anti-Counterfeiting Trade Agreement (ACTA), the Ukraine–European Union Association Agreement (AA), the Comprehensive Economic and Trade Agreement (CETA) and the Transatlantic Trade and Investment Partnership (TTIP) is another clear sign of this sentiment.

As one may expect in any democratic society, those anti-free-trade feelings inevitably find their way into the main political arena. When that happens, it is not uncommon that the political, economic and social arguments against free trade turn into legal arguments. For example, the ACTA was vetoed by the European Parliament even before the Court of Justice could rule, in the context of Opinion procedure 1/12, whether that agreement breached fundamental rights as the European Parliament feared (and as contested by the Commission). Similar issues were recently raised against CETA before the Bundesverfassungsgericht and during the ratification process by the Parliament of Wallonia.

Against this recent background, doubts as to the future of EU trade policy seem legitimate. In particular, one may wonder: should the EU, at this moment in time, continue to pursue a free trade agenda? If so, does the EU have the means to do that effectively?

Promotion of Free Trade is Part of EU's DNA

The first of those questions seems more *political* than legal. Yet, in this context, it cannot be ignored that modern economics considers the fundamental principle of comparative advantage, first developed in David Ricardo's 1817 book *Principles of Political Economy and Taxation*, still broadly valid today. There is also substantial agreement, among observers, that hardline protectionist policies have systematically failed. Thus, at least from an economic perspective, most see 'free trade policy as the best policy we are likely to get'. These principles thus provide a strong motivation for new trade agreements. In addition, the promotion of free trade is part of EU's DNA. That is not only true as regards trade within the EU (the establishment of the internal market), but also with regard to the EU's relations with the rest of the world. Articles 3 and 21 TEU as well as Article 206 TFEU make it very clear that free trade is a key value for the EU. Thus, notwithstanding these untoward winds, the EU Treaties do provide shelter from the storm.

As regards fears that an envisaged trade agreement might breach one or more fundamental rights, or might not strike a correct balance between different competing rights, that is clearly a *legal* issue. A legal issue that can be brought before the court having jurisdiction on this matter: the Court of Justice. It cannot be disputed that a request for an Opinion under Article 218(11) TFEU may concern, *inter alia*, the compatibility of an envisaged agreement with one or more fundamental rights enshrined in the EU Charter. Thus, national governments or EU institutions which may have doubts as to the impact of a given international agreement on the fundamental rights of EU citizens have at their disposal a specific legal mechanism which can be used to resolve that issue. Notably, the Court has not shied away, especially in recent times, from 'vetoing' agreements that it had found incompatible with the Treaties (despite their great political significance, such as in *Opinion 2/13*), and from declaring EU measures to be invalid because in breach of fundamental rights (such as in *Digital Rights Ireland* or in *Schrems*), or from interpreting EU measures so as to ensure compliance with fundamental rights (such as in *Google Spain*).

The second question above – very much a *legal* question – does not seem, however, to have a straightforward answer. To date, most major trade agreements entered into by the EU were concluded as mixed agreements. However, in a Union of (for the time being) 28 Member States and in which some Member States (like Belgium) require ratification of international agreements by more than one national parliament, the use of mixed agreements seems to have become unmanageable. To begin with, the time taken to complete all required ratifications at EU and national level is often unreasonable. In addition, as the examples of the AA and CETA show, ratification procedures at national level can be halted, hampered or simply delayed by local politics, referenda or by national judicial procedures.

This situation is, clearly, no longer sustainable. The credibility of the EU as international actor and global trade partner is at stake. In addition, the welfare lost for our society (and for those of our trading partners) is certainly not insignificant. Furthermore, the failure to conclude new trade agreements implies, by necessity, a renunciation by the EU to contribute to, or to influence, the standards applied by the rest of the international community in many fields (e.g. environment, labour, protection of fundamental rights).

Is the future of the EU trade policy inescapably gloomy? Maybe not.

A New Strategy

There seem to be different measures that the EU could take, as the law stands, to improve the effectiveness of its trade policy and, by reflex, its credibility as international partner. Clearly, these measures are all based on the premise that both the EU institutions and the Member States share a similar vision of trade policy and, for that reason, they are willing to renounce *something* in order to make that policy more effective. On that premise, a new strategy should be agreed between them beforehand so that, when new agreements are to be negotiated or concluded, such a strategy could be specifically implemented and, where necessary, enforced. The new strategy could, for example, include the following measures.

Firstly, the EU should consider resorting more often to EU-only agreements. The fact that an international agreement covers also some areas which fall within the shared competence of the EU and Member States does not imply that that agreement must necessarily be concluded as a mixed agreement. When the subject matter of the agreement falls within an area of shared competence, the choice between an EU-only and a mixed agreement is generally a matter for the discretion of the EU legislature (or, at least, of the EU legislature and the Member States). Thus, when problems or delays of ratification at national level may be anticipated, Member States should consider having the agreement concluded as an EU-only agreement.

One may wonder whether, in some cases, there may also be an obligation to do so by virtue of Article 4(3) TEU: that may be so, for example, where it is clear that a decision to conclude a mixed agreement might, because of the urgency of the situation and the time required for the ratification procedures at national level, seriously risk compromising the objective(s) pursued, or cause the EU to breach the principle *pacta sunt servanda*. In this context, it is also interesting to note that Article 18 of the Vienna Convention on the Law of the Treaties concerns the obligation not to defeat the object and purpose of a treaty prior to its entry into force.

Secondly, the EU should consider 'downsizing' its agreements, where feasible, so as to include only (or predominantly) provisions regulating areas which fall in the exclusive competence of the EU (in particular, the Common Commercial Policy (CCP)). The Treaty of Lisbon has definitely widened the scope of the CCP. In *Daiichi Sankyo*, the Court began to draw the consequences of the new provision, recognizing that the exclusive competence of the EU now cover also areas which – under the former Article 133 EC – fell in the shared competence. Admittedly, the precise contours of the post-Lisbon CCP may not be that clear yet. However, a number of proceedings currently pending before the Court (especially Opinion procedure 2/15) should provide the much-needed clarity on this matter.

In this context, it is worth adding that the Treaty of Lisbon has also codified, in Article 3(2) TFEU, the long-standing case-law of the Court according to which, the EU also has 'exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the EU or is necessary to enable the EU to exercise its internal competence, or in so far as its conclusion may affect common rules or alter

their scope'. Recent cases such as *Broadcasters, Opinion 1/13* and *Green Network* show the potential reach of this provision.

It may also be useful to point out that, according to settled case-law, an EU measure needs to be based only on the provisions which concern the main component(s) of the measure. Therefore, the fact that an agreement may contain some ancillary provisions which concern a matter which is different from its main component does not alter the nature of the agreement. That is all the more true if an agreement contains only provisions of programmatic nature. More specific sectorial agreements may be negotiated in parallel or subsequently – and, if appropriate, concluded as mixed agreements – on the basis of the principles included in the first (trade-related) agreement. In those circumstances, there would be no basis to claim that the latter agreement should be mixed. A certain measure of self-restraint on the part of the EU as regards the content of the agreements may also be considered a consideration for the Member States' decision to let the EU conclude those agreements as EU-only agreements.

Thirdly, when it will be impossible (for legal or political reasons) to conclude EU-only agreements, the EU and the Member States should do their utmost to accelerate the procedures of conclusion and ratification. For example, the Commission and the Council could agree on a timetable for those procedures. When the agreed period expires, the Commission would be entitled to start infringement proceedings against the Member States that have failed to ratify the agreement. Any additional unreasonable delay after the delivery of the judgment under Article 258 TFEU would permit the Commission to bring proceedings under Article 260(2) TFEU and thus request the imposition of financial penalties upon the Member States in default. In the light of the settled case-law of the Court, and in particular of the *PFOS case*, it does not seem far-fetched to regard an excessive delay, on the part of a Member State, to ratify an international agreement signed by both the EU and its Member States as a possible breach of the duty of cooperation enshrined in Article 4(3) TEU. Such a delay would, arguably, make it harder for the EU to achieve the aim pursued through the agreement in question, thereby hindering the coherence of EU external action.

In conclusion, advocating free trade in these days of 'post-truth' (or 'post-factual') politics may appear as futile as blowing against the wind. Yet, the pursuit and promotion of that principle is deeply rooted in the European project and expressly and solemnly declared in the Treaties. If the U.S. is likely to pursue an isolationist trade agenda, the EU could arguably take the lead on the global scene. Otherwise, other countries may try to fill that gap. However, the problems raised by the generalised use of mixed agreements for trade agreements have progressively become very difficult to overcome. Article 207 TFEU has been amended on numerous occasions, but those problems persist. Nevertheless, it is submitted that there are ways to interpret and apply the current Treaty provisions so as to permit the EU to conduct a more effective and credible trade policy. The EU may need to devise a new strategy to that end. With some willingness, determination and discipline from the EU institutions and the Member States, the future of EU trade policy may not be dark yet.

The views here expressed are strictly personal to the authors.

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